No. 51539-3-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Appellant

vs.

COREY DEAN HARRIS

Respondent

OPENING BRIEF OF RESPONDENT

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Responses to Assignment of Error Number One:

A. The State waived its severability/independent source argument by not raising it in the suppression hearing.

B. After excision of the information unlawfully obtained, the affidavit for search warrant fails to establish probable cause for issuance of the search warrant.

C. The reference to a "Tractor" in the affidavit for the search warrant is a red herring.

D. Application of the independent source doctrine is unsupported by the evidence.

Responses to Assignment of Error Number Two:

A. The State waived its argument that compliance with RCW 10.31.040 would have been a "useless act" by not raising it in the suppression hearing.

B. The State has failed to prove that compliance with RCW 10.31.040 would have been a "useless act."

Response to Assignment of Error Number Three:

A. Appellant made no argument in support of Assignment of Error Number Three, and it should be considered abandoned.

Response to Assignment of Error Number Four:

A. Appellant made no argument in support of Assignment of Error Number Four, and it should be considered abandoned.

II. STATEMENT OF THE CASE

Respondent does not dispute the Statement of Facts set out in Appellant's Opening Brief, with the exception of the sentence: "All of these farm or construction vehicles were found in an outbuilding that Harris leased...", page 2, 1st full paragraph. The characterization of "farm or construction vehicles" is not supported by the evidence. None of the items seized were "farm vehicles." It appears that the phrase was used in the Brief of Appellant to suggest that the tractor referenced in the Search Warrant Affidavit has some connection to the crime under investigation.

The construction equipment sought under the search warrant was a Caterpillar 259D Track Loader. It is sometimes referred to in the Report of Proceedings as a "track hauler" or, by transcriptionist's error, as a "tracked hauler." It's all the same equipment. It is not a farm tractor.

As conceded by Appellant at page 16, footnote 9 of the Opening Brief of Appellant, a tractor is not a Track Loader, and the reference to a tractor adds nothing to the probable cause evaluation.

The search warrant was issued by the Honorable Clark County District Court judge Kelli Osler. The Superior Court judge

and Trial Court judge in the suppression hearing was the Honorable Scott Collier. Judge Collier will be referred to herein as the Trial Court.

The building which was searched is referred to by various terms in the Report of Proceedings, such as "garage," "shed"" "shop" or "storage building." There was only one structure searched; all the terms refer to the same entity.

III. ARGUMENTS

1. ARGUMENTS IN RESPONSE TO ASSIGNMENT OF ERROR NUMBER ONE

A. RESPONSE NUMBER ONE: THE STATE WAIVED ITS SEVERABILITY/INDEPENDENT SOURCE ARGUMENT BY NOT RAISING IT IN THE SUPPRESSION HEARING

Assignment of Error Number One is not properly before the Appellate Court. The argument that the affidavit for search warrant was sufficient to establish probable cause, even after excision of the illegal portion, was not briefed at the Trial Court level, was not raised or argued at the suppression hearing, and was waived. State v. Scott, 110 Wn.2d 682, 757 P.2d 492 | (1988), State v. Lord, 117 Wn.2d 829, 822 P.2d 177, (1991).

There were only two issues litigated and decided at the suppression hearing in this matter: (1) the validity of the consent to

enter the storage building; and (2) whether or not the Deputy Sheriff complied with the Knock and Announce statute, RCW 10.31.040.

Numerous other issues were not addressed, (see Clerk's Papers, pages 25-48, Memorandum in Support of Motion to Suppress) because the Trial Court correctly determined that the issue of validity of the consent to enter was dispositive, and the State, through Deputy Prosecutor Randy St. Clair, acquiesced in that determination. The Court stated at the beginning of the hearing:

> "If I find the first entry was not valid, the information of finding the track loader in there would never have been had. You have to take that out. You could never have gotten the warrant.
>
> MR. BENNETT: Right.
>
> MR. ST. CLAIR: And, similarly, we'd agree, Your Honor, that if you found against us on the validity of the warrant, then further testimony on plain view would not matter either. RP p. 6, lines 14-22.

At no point in the course of the suppression hearing did the Deputy Prosecutor argue the issues now raised on appeal. The Deputy Prosecutor filed no written Response to the Motion to

Suppress, and therefore no written argument by him is included in this record. He presented no evidence as to severability or independent source, and made no argument on the claims of severability or independent source now raised on appeal. The controlling Rule of Appellate Procedure is:

> " RULE 2.5
> CIRCUMSTANCES WHICH MAY AFFECT
> SCOPE OF REVIEW
>
> (a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the Trial Court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of Trial Court jurisdiction,
> (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a Trial Court decision which was not presented to the Trial Court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the Trial Court if another party on the same side of the case has raised the claim of error in the Trial Court...."
>
> None of these exceptions apply.

A review of the record is telling. The terms "severability" and "independent source" or any other conceivable synonym were never uttered at the suppression hearing.

The first time that there was a hint of a claim that probable cause existed independent of the initial unlawful entry and observations was after the Trial Court had ruled on the merits, and granted the Motion to Suppress.

At that time, there was no motion brought by the State for reconsideration, nor to reopen the evidence or the argument.

The Deputy Prosecutor, 18 days after conclusion of the suppression hearing, admitted that he had not raised the severability issue during the suppression hearing, because he had not even thought of it until after the suppression hearing:

> "MR. ST. CLAIR: Actually, the State has an issue that -- reviewing the record and my own notes, I actually thought about it a day or two after, Your Honor did not make any findings or we didn't do a severability analysis."
> RP p. 116, l. 20-23.

The suppression hearing concluded on January 12, 2018. At the hearing to enter Findings of Fact and Conclusions of Law, held on January 30, 2018, the Deputy Prosecutor filed no argument in writing, and proposed no written Findings of Fact and Conclusions of Law. The State's effort to salvage his concededly invalid case of consent to search, by raising a new issue too late, was ill-fated.

Appellant, on appeal, suggests that the issue of severability was raised below, by citing to the Report of Proceedings at page 116, however this was not at the suppression hearing on January 12, 2018; it was only after the Court had ruled and was entering Findings and Conclusions on January 30, 18 days later.

B. RESPONSE NUMBER TWO: THE TRIAL COURT DID NOT ERR IN FINDING THAT THE EXCISED AFFIDAVIT FAILED TO ESTABLISH PROBABLE CAUSE

On the merits, the State cannot establish on appeal that the Trial Court erred in concluding that the affidavit for search warrant was insufficient to establish probable cause for issuance of the warrant.

The first very important issue is the burden of proof and standard of proof to be applied.

In most cases where a search warrant is properly issued, there is a presumption that he issuing court/magistrate was correct, and the burden is on the defendant to overcome that presumption, by demonstrating that no reasonable judge/magistrate would have issued the warrant. Under the facts of this case, the most significant aspect of the affidavit, the unlawful eye witness observations by the Deputy Sheriff of the item sought, were

unlawfully obtained and must be excised. Therefore, the usual presumption of validity evaporates.

As conceded by the State, there is no preference given to the warrant issued below. State v. Ollivier, 178 Wn. 2d 312 P.3d 1 (2013) State v. Eisfeldt 163 Wn. 2d 628, 185 P. 3d 580 (2008.) In a case where the issue is properly presented or preserved, the sufficiency of the redacted affidavit is examined *de novo* by the reviewing court.

Respondent submits that the analysis, in a case where the issue was not raised below, should be even more demanding, in light of the high expectation of privacy afforded by Article I, Section 7 of the Washington State Constitution. The burden of proof should fall upon the State, and the standard of proof should be to require the State to demonstrate that no reasonable judge would **decline** to issue the warrant.

The Trial Court judge, despite the fact that the State failed to raise the issues of severability/independent source relating to the affidavit in this case proceeded to address the issue and held that the affidavit, even with excision, was fatally defective. The Trial Court judge acted well within his discretion to reject it, especially in

the absence of any argument by the State to support it at the suppression hearing.

The affidavit was based upon unreliable information.

First, an Officer Maloney, unknown to Deputy Fields, relayed hearsay from an undisclosed, unidentified informant. Officer Maloney was not the informant; he was merely the conduit; his hearsay is entitled to no presumption of reliability usually afforded to police officers. That information consisted of this:

> "I was contacted by Officer Maloney and he stated they had a Caterpillar stolen Friday night. He said the Caterpillar is equipped with a GPS tracking system and it might be in the area of 18228 NE 72d Avenue. I checked the area and was unable to locate it and could not find an address matching and did not see the Caterpillar outside any property."

The identity of the source of Maloney's information is not revealed. No track record of reliability is provided for the informant. Nor is the basis of knowledge of either Maloney or his anonymous source. Neither prong of the Aguilar-Spinelli test is satisfied, see Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509; 12 L.Ed.2d 723 (1964), and Spinelliev. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed. 2d 637 (1969), and State v. Jackson, 102 Wn.2d 432, 688 P. 2d 136 (1984).

To compound matters, the reliability of the anonymous source, and the alleged "GPS device" is disproven in the affidavit itself. No Track Loader was found at the address, and the address did not even exist. The "track record" established as to Maloney, his informant and the GPS device establishes unreliability.

Next, Deputy Fields states in his affidavit:

> "On 03/21/2017 I was again dispatched to 18228 NE 72d Avenue. I contacted mark Rickabaugh via telephone who is the owner of the stolen Caterpillar. He provided me with pictures and GPS locations of where the Caterpillar had been. He stated the last update he received showed the Caterpillar in and near an outbuilding. I was able to match the photos to Google maps and found the address to be 18110 NE 72d Avenue..."

Here, an informant is identified with a name, however, again there is no information established prior reliability. Assuming that Rickabaugh was the anonymous informant who provided information to Officer Maloney, all that an issuing magistrate would know is that Rickabaugh and/or the GPS device had provided false, inaccurate information in the past.

Mr. Rickabaugh provided Deputy Fields "...with pictures and locations where the Caterpillar had been. He stated the last update he received showed the Caterpillar in and near an outbuilding."

Notably missing from this sparse recitation is any indication as to when these claimed observations were made or when the "last update" had occurred. If the "last update" was the location that had already proven to be false, it adds nothing to establish probable cause. Deputy Fields did not bother to establish when that last update occurred, and therefore the issuing magistrate wuld also lack any such knowledge.

In this case, the affidavit establishes no fact to justify a finding of reliability. As noted above, the only information provided as to prior reliability was negative. There is no information in the affidavit as to the brand, model, age, effective range, condition, or currency of software of said device.

The State relies heavily upon a claim that GPS devices have attained general acceptance in the courts, and evidence from such has been admitted as evidence. From these assertions, the State seems to argue that whenever someone claims that "a GPS device" shows a location of an object, that amounts to probable cause that the object will be found at the location claimed.

State v. Jackson, 150 Wn. 2d 251, 76 P. 3d 217 (2003) cited by the state, arrives at no such conclusion. The sufficiency of an

affidavit based upon nothing more than a "GPS device" was not at issue. The case held that before obtaining a warrant to plant a GPS device on a vehicle, there must be probable cause for issuance of such a warrant. It did not hold that GPS evidence constitutes probable cause.

U.S. v. Jones, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed. 2d. 911 (2012) also cited by Appellant is in accord with Jackson, *supra*, in holding that attachment of a GPS device to a vehicle is a Fourth Amendment search. The case does not stand for the proposition that mere incantation the term "GPS device" is sufficient to establish probable cause to invade a citizen's privacy.

U.S. v. Lopez-Lopez, 282 P.3d 1 (2002), cited by the State, offers no guidance (no pun intended). In that case, a DEA agent was allowed to testify that drug smugglers use GPS devices to locate aerial drop sites of drugs, and that a GPS device was found in the defendant's possession. There was no issue, and therefore no discussion in the case as to whether or not a GPS device such as Mr. Rickabaugh's, previously shown to be unreliable, could be the sole basis of a finding of probable cause.

It should be noted that Respondent is not arguing that GPS evidence has not received general acceptance in the scientific community, or that it is not admissible in evidence, if a proper foundation is laid. (Although in U.S. v. Bennett, 363 F. 3d 946 (2004), the 9th Circuit Court of Appeals held that testimony as to coordinates shown on a GPS device is inadmissible in a trial.

The argument here is that this affidavit is so bereft of any showing of reliability of this particular device, which had provided false and inaccurate information the day before, that the Trial Court judge deciding the suppression hearing did not err in declining to find probable cause on these facts. A reasonable judge, reviewing this affidavit, could decline to issue the search warrant.

C. RESPONSE NUMBER THREE: THE REFERENCE IN THE AFFIDAVIT TO A TRACTOR IS A RED HERRING.

When reviewing the contents of the affidavit, the Trial Court was not misled by the prosecution into considering the "tractor" red herring. (In the legal context "red herring" refers to an irrelevant legal or factual issue, intended to distract or mislead.)

The affidavit for search warrant recited that the owner of the storage building, Daniel Tucker: "...said he knows Cory has a tractor in the building but does not know the type." However, the affidavit goes on to say that Daniel said: "He comes to the garage three or four times a year." The Track Loader was reported stolen just a few days before the affidavit was written. There is no dispute that the supposed tractor referred to by Tucker was not the Track Loader in question. The difference in appearance is analogous to the difference between a Volkswagen and a Sherman Tank. See photos submitted to the Trial Court in Defendant's Memorandum in Support of Motion to Suppress, Clerk's Papers p. 72, Appendix p. 1

A review of the Report of proceedings demonstrates that the Trial Court saw right through this subterfuge:

> MR. BENNETT: Judge, I really want to emphasize that I think this borders on deception to the argument that Tucker saying at some unknown time he had seen a tractor establishes probable cause to believe that there's a stolen tracked hauler in this shed within the last three days.
>
> MR. ST. CLAIR: Well, the State disagrees, but (inaudible).
>
> THE COURT: Okay. I understand.

> And I'm not putting weight on that testimony because when Tucker made that statement, there's no time reference to it whatsoever whether it was in the three days. Three years."

D. RESPONSE NUMBER FOUR: THE INDEPENDENT SOURCE DOCTRINE IS UNSUPPORTED BY THE EVIDENCE.

If the Prosecutor had raised the issue of severability at the suppression hearing below, the Defense would have had the opportunity to refute the theory. Even if the Trial Court made a determination that probable cause existed to issue the search warrant without the offending unconstitutional observations, the inquiry would not have ended there. Under the independent source doctrine, discussed in State v. Spring, 128 Wn. App. 398, 403, 115 P.3d 1052 (2005), the State would have the burden of establishing whether or not the Deputy Sheriff would have sought a search warrant if he had not entered the storage shed and seen the property sought therein. On appeal, the State suggests that the case should be remanded for an evidentiary hearing on whether or not the deputy sheriff who erred in entering the shop without valid consent would have sought (and obtained) a search warrant without the unlawful entry and observations. This factual issue could have been, and would have been resolved if the issue had been raised in the suppression hearing, but it was not. The State

failed to make any record. Failure to make a record does not entitle the failing party to reconvene an evidentiary hearing, when the lack of record is the fault of that party.

In the Spring case, *supra*, the State did make the severability/independent source argument at the suppression hearing, and was successful. In that case, police received information from a hotel employee that there was an active methamphetamine lab in a motel room. A supervisor for the police testified at the hearing that "the plan" was to go to the motel, interview the employee as to her observations, and then apply for a search warrant. When they went to the hotel, however, they encountered the Defendant, Spring, in the parking lot, who admitted that methamphetamine was being cooked in the room. He was arrested, without being given Miranda rights, Miranda v. Arizona , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and then gave consent for the police to search his truck. Evidence was found in the truck which was referenced in an affidavit for a warrant to search the motel room.

The Trial Court, in a suppression hearing, ruled that the evidence from the truck and the "un-Mirandized" admissions after

arrest were unlawfully obtained, and excised them from the search warrant affidavit. The Trial Court held that the balance of the affidavit was sufficient for probable cause to issue the search warrant.

On the second issue, whether or not the police would have sought a search warrant without the admissions and evidence from the truck, the State not only raised the issue, but presented proof that "the plan" all along was to seek a search warrant based upon the employee's observations. The encounter with the defendant, Spring, was fortuitous and not the motivating factor to seek the warrant.

The decision in Spring quotes and relies upon Murray v. United States, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988). In Murray, federal agents stopped some trucks leaving a warehouse, and found marijuana inside the trucks. They unlawfully entered the warehouse and saw marijuana therein. They obtained a search warrant for the warehouse, but did not include their unlawful observations in the affidavit. They conducted a search of the warehouse under the warrant and seized evidence.

Even though this was not an "excision" case, the United States Supreme Court held that:

> "The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." 487 U.S. 533,at 542.

What is significant here is that in Spring, (1) the issue of independent source was raised and argued at the suppression hearing, (2) in Spring the State presented affirmative evidence in the suppression hearing that the warrant would have been sought without the unlawfully obtained evidence, (3) in Spring, the unlawfully gathered evidence was not part of the original investigative plan at all, but was completely fortuitous, and (4) if the decision to seek a search warrant was "prompted" by the unlawful observations, then the independent source doctrine would not apply.

The State in this appeal suggests that remand to the Trial Court for an evidentiary hearing is the proper procedure. The

problem with that suggestion is that it allows the State to present purely subjective, after the fact, result-oriented testimony. There is absolutely no doubt that after thorough preparation, Deputy Fields will testify that he would have sought a search warrant even if he had not seen the Track Loader in the shop.

Respondent takes the position that remand for an evidentiary hearing is not appropriate where the State had ample opportunity to present such evidence at the Trial Court level (as was done in Spring, supra) and declined to do so.

Additionally, the affidavit itself answers the question. Deputy Fields recites:

> "Based on the GPS location provided by the victim and the matching Caterpillar with the removed VIN number located in the out building, I believe there is probable cause to search the building..."

This statement demonstrates that the deputy's decision to seek a warrant was prompted by his suspicions being corroborated by his actual observations. Most significantly, unlike in the Spring case, Deputy Field's step-by-step investigative plan is clearly set out in his affidavit. He received inaccurate, unreliable information from an unknown informant, through Officer Maloney; he then talked to the informant, and before relying solely upon that

informant and his negative track record, sought to, and succeeded in corroborating the new information by personal observations.

Again, in our case, the deputy's intent was not explored at the suppression hearing, because the State never raised the issue at the suppression hearing.

The issue of the deputy's subjective intent was not developed at the suppression hearing; however at the entry of Findings and Conclusions 18 days later, the following exchange occurred on the rerecord:

> "MR. BENNETT: When I interviewed -- and, again, this is because I didn't make the complete record because they waived the severability by saying that, you know, it's the entry that controls everything.
>
> In his interview with me, Fields admitted, I didn't have probable cause. I had suspicion, but just -- no. Based on the -- on this GPS, I didn't have probable cause.
>
> That's what he told me in an interview.
>
> Now, that's his lay opinion, I understand.
>
> THE COURT: No, I understand.
>
> MR. BENNETT: But it's very significant.
>
> THE COURT: He's relied on the fact of this co-authority

from Tucker in entering that building." RP p.127, line 7-19.

From this exchange, it can be seen that the Defendant was in a position to refute any independent source argument, had it been raised at the suppression hearing.

Obviously, Deputy Fields would not have sought a search warrant with an affidavit reciting that "I do not believe that I have probable cause, but instead I have (reasonable) suspicion."

The State should not be afforded an opportunity to re-open the evidence and seek reconsideration of the issue, as a reward for forgoing it in the suppression hearing. While a Defendant, who is protected by the Federal and State Constitutions, can sometimes raise an issue for the first time on appeal if it involves manifest error affecting a constitutional right, State v. Sublett, 176 Wn.2d 58, 292 P.3d 715, (2012). The State enjoys no such right.

2. ARGUMENTS IN RESPONSE TO ASSIGNMENT OF ERROR NUMBER TWO

A. RESPONSE NUMBER ONE: THE STATE WAIVED ITS ARGUMENT THAT COMPLIANCE WITH RCW 10.31.040 WOULD HAVE BEEN A "USELESS ACT" BY NOT RAISING IT AT THE SUPPRESSION HEARING

Assignment of Error Number Two is not properly before the Court. The argument that the State was excused from complying

with the statute (twice) because it was later discovered that the building was unoccupied, was not briefed at the Trial Court level, was not raised at the suppression hearing, and was waived. State v. Scott, 110 Wn.2d 682, 757 P.2d 492 | (1988), State v. Lord, 117 Wn.2d 829, 822 P.2d 177, (1991).

Once again, the State raises an issue for the first time on appeal. This time, the theory of "useless act" was eschewed by the Deputy Prosecutor at the suppression hearing, and also was never even raised when Findings of Fact and Conclusions of Law were entered. For the reasons stated above on the issue of waiver of the severability/independent source doctrine, review on the knock and announce/useless act issue should be denied.

B. RESPONSE NUMBER TWO: THE STATE HAS FAILED TO PROVE THAT COMPLIANCE WITH RCW 10.31.040 WOULD HAVE BEEN A "USELESS ACT."

RCW 10.31.040 provides:

"Officer may break and enter.

> To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his or her office and purpose, he or she be refused admittance."

The knock and announce issue has no significance if the Appellate Court determines that the search warrant was invalid.

Only if the warrant is upheld on appeal does the knock and announce issue become important. The issue was raised in the Trial Court as an alternative reason for invalidating the search.

In this case, Deputy Fields entered the locked, secure building twice; each time preceded by the simple statement: "Sheriff's Office." RP p. 25, line 25, p. 26, line 1.

This procedure is a clear violation of the knock and announce statute. State v. Beason, 13 Wn. App. 183, 534 P.2d 44 (1975), holding that a simple announcement of "Police" without a declaration of purpose and demand for entry is insufficient to comply with the statute.

Appellant's new theory on the knock and announce violation is that it would have been a "useless act" for Deputy Fields to comply with the statute. One wonders, then, why he attempted to do so at all (unsuccessfully.)

It appears that the State does not contend that Deputy Fields complied with the statutory requirements. Clearly, he did not.

Instead, for the first time on appeal, the State contends that compliance would be a useless act, because in hindsight, the storage building was not occupied by any other persons.

The State fails to address the other element of the useless act doctrine, that is, that the deputy knew the building was unoccupied. The purpose of the knock and announce statute is to protect the deputy, as well as any potential occupants from harm arising out of an unannounced entry. This purpose is not furthered by deputies ignoring the statutory requirements, in the hopes that no-one is home.

There is nothing in the record created by the State to indicate that Deputy Fields knew, upon either entry, that the building was unoccupied. Again, this gap in the record is attributable to the State, for failing to raise the issue in a timely manner (or ever, prior to appeal.)

Two entries were made without complying with the statute. As to the first unlawful entry when Deputy Fields saw the Track Loader, he approached and entered a closed, locked, opaque structure, with no visibility as to what or whom he would find within. RP p. 25, Lines 6-10. He entered only 3 to 5 feet. RP page 27,

lines 1-10. Clearly, there were no exigent circumstances justifying non-compliance with RCW 10.31.040.

Deputy Fields looked for a serial number on the Track Loader and could not find one RP p. 29, lines 3-5, then left the building. He did not search the building to determine if anyone was present, but out of his sight, RP page 30, lines 2-5.

He later returned with a search warrant and again, failed to comply with RCW 10.31.040 before making entry. Deputy fields conceded this point in his testimony at the suppression hearing. RP p. 52, lines 4-19.

There is no evidence in the record to support a claim that Deputy Fields chose not to comply with the statute because he knew the building was unoccupied, and therefore he knew it would be pointless, or an empty gesture to comply with the law.

There is no evidence in the record to support the theory that Deputy Fields knew the building was not occupied.

The State argues that the "useless act" exception to RCW 10.31.040 applies whenever the premises fortuitously turns out to be unoccupied, citing foreign and federal cases. The

persuasiveness of federal cases, applying only the 4th Amendment is in doubt, in light of the United States Supreme Court decision in Hudson v. Michigan, 547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed. 2d56 (2006), which holds that the exclusionary rule does not apply to knock and announce violations. This is not the law of Washington, under Article I, section 7 of the State Constitution, State v. Lehman, 40 Wn. App 400, 698 P. 2d 606 (1985).

The State's argument goes far beyond the unique facts and actual holdings of Washington cases. For example, in State v. Campbell, 15 Wn. App 98, 547 P.2d 295 (1976):

> "In the present case, the police were summoned to the apartment to investigate a recent Burglary. The officer listened to an eyewitness' account of the crime as soon as he arrived on the scene, and he discovered an unsecured, apparently unoccupied apartment with a wide-open door and broken window. To then knock, announce his identity and purpose, demand admittance, and wait for a refusal of admittance before entering to investigate the crime would have served no useful purpose and only lessened the chances for an effective investigation of the burglary. It was reasonable to believe that the lessee of the apartment was not present. Knocking before entrance, therefore, would have been only an empty act. An announcement prior to entry could have increased the danger to the officer, for any suspect remaining within would have been alerted to the presence of the police. Furthermore, alerting a perpetrator hiding within the apartment to the presence of the police would only have aided a possible escape and frustrated a potential arrest. The situation

> confronting the officer constituted such exigent and necessitous circumstances as excuse strict compliance with the "knock and announce" requirement and indicate an unannounced entry." 15 Wn. App. at 102, 103."

As is readily evident, Campbell was not a case where the police went to a fully secured, locked building, as in the Respondent's case. There were no exigent circumstances in the Respondent's case, and the unique circumstances present in Campbell were lacking in the intrusion into Mr. Harris' building. In the Harris search now before this court, there was no "unsecured, apparently unoccupied apartment with a wide-open door and broken window."

In Campbell, the court noted that "It was reasonable to believe that the lessee of the apartment was not present" and "The situation confronting the officer constituted such exigent and necessitous circumstances as excuse strict compliance with the "knock and announce" requirement."

Campbell is premised upon the exigent circumstances of a potential burglary in progress; a far cry from the uneventful scenario encountered by Deputy Fields. The most significant fact in the Harris search is that Deputy Fields had absolutely no excuse for failing to comply with the statute.

Based upon the analysis of the Court, without any doubt, if the officer in Campbell had approached a closed, locked, shuttered apartment, upon a tip that there might be stolen property inside, he would have been required by the Washington Supreme Court to announce his office and purpose, demand entry, and wait a reasonable amount of time before entering, as there was no reason to believe that the building was unoccupied.

The Washington Supreme Court has placed a significant qualification upon invocation of the "useless act" exception to RCW 10.31.040 in State v. Coyle: 95 Wn.2d 1, 621 P.2d 1256 (1980):

> "Compliance is a "useless gesture," and is therefore not necessary, "when it is evident from the circumstances that the authority and purpose of the police is already known to those within the premises." 2 W. LaFave, *supra*, § 4.8(f), at 137; *accord, e.g., Ker v. California*, 374 U.S. 23, 55, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963) (Brennan, J., dissenting); *State v. Campbell*, 15 Wn. App. 98, 101-02, 547 P.2d 295 (1976). State v. Coyle, 95 Wn. 2d at 11 (Emphasis added)

This qualification emphasizes the facts known to the officer at the time of the entry, as opposed to after-acquired knowledge.

> "We agree with the clear majority of courts, including the United States Supreme Court, that

> noncompliance may not be excused unless the police are "virtually certain" the occupants are aware of their presence, identity, and purpose prior to their entry."

State v. Coyle, *supra*, 95 Wn. 2d at 11.

Applying this test, the State presented no evidence that Deputy Fields was "virtually certain" that compliance with the statute would be a useless act. He had no knowledge as to whether potential occupants were already aware of his presence, identity and purpose, nor whether there were occupants at all. In these circumstances, he was required to comply with the statute, rather than dispense with compliance and hope for the best. Such a procedure will inevitably lead to tragedy in the future.

By analogy, should the Court embrace a rule that permits a police officer to dispense with providing Miranda rights to an arrestee, and in a suppression hearing, justify the omission because it is later learned that the arrestee is a Criminal Law professor?

A rule establishing that compliance with RCW 10.31.040 is unnecessary if the structure is unoccupied should not be premised upon ignorance of the officer. For example, in State v. Schimpf, 82 Wn. App. 61, 914 P.2d 1206 (1996), Division 3 of the Court of

Appeals applied a "useless act" analysis where police looked into an empty, enclosed backyard, and entered it by opening a gate. The police knew there was no-one in the back yard to whom a demand could be directed.

The court in Schimpf cited cases from other jurisdictions which relied upon the fact that the police knew that no-one was present to receive a knock and announce salutation:

> "Courts in other jurisdictions have reached the same conclusion in similar circumstances. In *People v. Mayer,* 188 Cal. App. 3d 1101, 233 Cal. Rptr. 832 (1987), officers executed a search warrant at a residence they knew to be fortified and guarded by cameras. They approached the residence from the rear, climbed over a fence, and entered through a sliding glass door off the back patio. 233 Cal. Rptr. at 836-37. The court rejected an argument that the officers' entry into the backyard violated California's statutory "knock-notice" requirement, in part because "there was no one in the back yard at the time to receive the notice."233 Cal. Rptr. at 838.
>
> And, in *State v. Sanchez,* 128 Ariz. 525, 627 P.2d 676 (1981), officers executed a search warrant at a house surrounded by a six-foot chain-link fence with locked gates; officers cut the lock and entered the yard without identifying themselves or announcing their purpose. The court held the entry did not violate Arizona's announcement provision, because application in that circumstance would not serve the three purposes of the statute. 627 P.2d at 679. The court observed: "[I]t was apparent to the officers that the yard within the chain link fence and outside the house was vacant." 627 P.2d at 680."

State v. Schimpf, 82 Wn. App at 65, 66.

Finally, these words from Coyle, *supra*, make eminent sense:

> "The nonoccurrence of either violence or property damage is a felicitous fortuity, and cannot constitute an after-the-fact justification which excuses the unannounced entry. CF. UNITED STATES v. DI RE, 332 U.S. 581, 595, 92 L. Ed. 210, 68 S. Ct. 222 (1948); STATE v. LESNICK, 84 Wn.2d 940, 944, 530 P.2d 243 (1975)." Coyle *supra* 95 Wn. 2d at 12.

3. ARGUMENT IN RESPONSE TO ASSIGNMENTS OF ERROR NUMBERS THREE AND FOUR.

A. RESPONSE NUMBER ONE: APPELLANT HAS MADE NO ARGUMENT IN SUPPORT OF ASSIGNMENTS OF ERROR NUMBERS THREE AND FOUR, AND THEY SHOULD BE CONSIDERED ABANDONED.

The State, Appellant herein, has assigned as error the Trial Court's rulings suppressing evidence and dismissing the prosecution. Respondent acknowledges that the State has presented argument as to the legal issues leading up to those rulings, but out of caution and defense counsel's duty to zealously represent Mr. Harris, Respondent requests that the Court hold that the validity of the Trial Court's orders of suppression, Assignment of Error Number 3, and dismissal, Assignment of Error Number

Four, have not been preserved, and have been abandoned, due to failure of the State to present any argument in its Opening Brief of Appellant, specifically addressed to Assignments of Error Numbers 3 and 4. Murphy v. Murphy, 44 Wn.2d 737, 270 P.2d 808 (1954), cited in State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993), Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 630, 733 P.2d 182 (1987).

V. CONCLUSION

Respondent submits that the State has failed to preserve any of its arguments, and has waived them by failing to brief or present them to the Trial Court.

Further, Respondent submits that the issues raised by Appellant, if heard by the Appellate Court, lack merit.

Respondent prays for an opinion affirming the suppression and dismissal orders.

Dated the 30 day of September, 2018

Respectfully submitted

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TRACTOR

TRACK LOADER

0-000000072

No. 51539-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Appellant

vs.

COREY DEAN HARRIS
Respondent

CERTIFICATE OF SERVICE

I certify that on the 1 day of October, 2018, I caused a true and correct copy of the Brief of Respondent to be served on the following by e-mail and US mail, postage prepaid:

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ORIGINAL

Dated the 1 day of October, 2018

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